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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY DEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Two points in respondent's brief call for a short reply.

1. Respondent argues (Br. 34–35) that since retail fur sales are intrastate, the Fur Products Labeling Act cannot constitutionally be applied to retail invoicing. However, as the Court of Appeals pointed out (R. 68), some of respondent's invoices covered fur products which were "delivered outside the State of Illinois." See Commission Exhibits 17 (Wisconsin), 19, 20, and 30 (Indiana) (not printed), and the Commission's opinion (R. 33). Thus, unlike the wholly intrastate penny-candy sales involved in *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349, upon which respondent relies (Br. 34), respond-

ent's sales of fur products were not "strictly local."

In any event, *United States* v. *Sullivan*, 332 U.S. 689, lays to rest any question as to the constitutionality of applying the Act to retail invoicing. That case upheld the conviction, under Section 301(k) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(k)), of a retail druggist for "misbranding" a drug while "held for sale after shipment in interstate commerce" (pp. 690–691). Section 502(f) of the Act (21 U.S.C. 352(f)) provides that a drug is "misbranded * * * [u]nless its labeling bears" certain information. The druggist had purchased in intrastate commerce drugs previously shipped in interstate commerce in properly labeled containers. However, he later resold the drugs in new packages without attaching a new label containing the required information. The Court held that the statute outlawed "misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment" (p. 696), and that the statute so interpreted was a valid exercise of the commerce power (pp. 697–698).

If Congress can require a retail druggist to reissue a label "for the information and protection of the consumer" (p. 695) covering drugs which have been shipped in interstate commerce, it can likewise require a retail fur dealer to furnish the consumer with an invoice, similarly designed for his "information and protection," covering fur products made of furs

shipped in interstate commerce. The scope of the commerce power does not turn upon possible technical differences, upon which respondent relies, between the preparation of an invoice and the statutory requirement under the Food and Drug Act that a druggist "put [labels] on * * * the boxes to which the tablets were transferred" (*Sullivan* case, *supra*, p. 697). Here, as in *Sullivan*, "the question relates to the constitutional power of Congress under the commerce clause to regulate the branding [or invoicing] of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce" (p. 698). This Court has decided that Congress has that power.

2. In urging that the court below properly modified the part of the order directed against misbranding, respondent makes the point (Br. 40) that the order did not merely direct it to cease and desist from "misbranding fur products by failing to affix labels to fur products showing each element of information required by the Act", but specified each such element. We construe the foregoing quoted language as having the same effect as the language used by the Commission, namely, it would prohibit failure to include all six categories of information required by the Act, and not just the three with respect to which the Commission found violation. In the circumstances, substituting the quoted language for that used by the Commission would not change the substance of the order, and would eliminate respondent's principal objection to the original order (Br. 36): that it might "suggest" "to the public" that the store "has sold garments containing

used fur or inferior parts of fur and has concealed the fact." While we believe, for the reasons set forth in our opening brief (pp. 27–34), that the order drafted by the Commission is valid, we would not object to a change in its form by substituting the quoted language suggested by respondent.

Respectfully submitted.

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